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In the Supreme Court of the United States

No. 77-993

UNION OIL COMPANY OF CALIFORNIA,
a California corporation,
Petitioner,

vs.

ASHLAND OIL COMPANY OF CALIFORNIA,
a California corporation, and
DEPARTMENT OF ENERGY

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

MOSES LASKY
Spear Street Tower, Suite 2840
1 Market Plaza
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorney for Petitioner

Of counsel:
BROBECK, PHLEGER & HARRISON
Spear Street Tower
1 Market Plaza
San Francisco, CA 94105
Telephone: (415) 442-0900

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

Petitioner prays that a writ of certiorari issue to reverse that portion of the judgment of the Temporary Emergency Court of Appeals in *Ashland Oil Company of California v. Union Oil Company of California and Department of Energy,* No. 9-38, which reversed the judgment of the district court.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals has not yet been reported; a copy is attached as Appendix A. Appendix B is a copy of its judgment. The district court wrote no

All emphasis in quotations in this petition has been added, unless otherwise stated.

opinion, but its reasons were expressed from the bench; a transcript of its remarks is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court rests on § 705(c)(2) of the Department of Energy Organization Act (1977), 91 Stat. 607 (42 U.S.C. § 7295 note), which preserves to actions already commenced the provisions of § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 89 Stat. 948 (15 U.S.C. § 754(a)(1)), which in turn incorporated § 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750 (12 U.S.C. § 1904 note). The judgment of the court below was entered December 12, 1977. Its jurisdiction was based upon § 211(b)(2) of the 1970 Act, as amended, 85 Stat. 749, incorporated into the 1973 Act, 87 Stat. 633. The district court had jurisdiction under 28 U.S.C. § 1331(a) and § 211(a) of the 1970 Act, as amended, 85 Stat. 748, as incorporated into the 1973 Act, 87 Stat. 633.

QUESTION PRESENTED

An action was brought to enforce rights created by a federal statute which provides no period of limitations, namely, an action under the Emergency Petroleum Allocation Act of 1973, continued in the Department of Energy Organization Act (1977), to recover for alleged excess of prices charged over government-imposed ceiling prices. The Act permits award of treble damages. Both courts below held that recovery of treble the overcharge was barred by the state one-year statute of limitations applicable to actions upon a statute for a penalty, and the district court construed the same state statute as barring recovery of the "overcharge" and so held. The court below refused to apply the state statute of limitations to the "overcharge" because of its own view of a "national policy" admittedly not found in the text of the statute or its legislative history. Then, to the end of filling

the gap produced by its refusal to apply state law, it split the single cause of action created by Congress into two remedies, one for single and the other for multiple damages, and created its own period of limitations for the second of the two remedies. Did it not thereby err? Is there any basis for departure from law settled by this Court (1) that the availability of different remedies does not constitute different causes of action, and (2) that the state statute of limitations must be applied?

STATUTES INVOLVED

DEPARTMENT OF ENERGY ORGANIZATION ACT, § 705(c)(2) 91 Stat. 607 (42 U.S.C. § 7295):

> "(1) the provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and,
> "(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted."

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, § 5(a)(1), 87 Stat. 633, as amended, 89 Stat. 948-9 (15 U.S.C. § 754(a)(1)):

> " *** sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; ***"

ECONOMIC STABILIZATION ACT OF 1970, as amended, 85 Stat. 748-750 (12 U.S.C.A. § 1904 note):

> "§ 210. Suits for damages or other relief
> "(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regu-

lation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

Sec. 211(a): "The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; ***"

Sec. 211(b)(2): "The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

Sec. 211(g): "Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code."

28 U.S.C. § 1331(a): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

California Code of Civil Procedure:

§ 312: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

§ 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

§ 338: "Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

§ 340: "Within one year:

"1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation;"

STATEMENT OF THE CASE[1]

Petitioner Union was compelled by the Federal Energy Administration ["FEA"] to sell gasoline to Ashland, not one of its own customers, and to do so at prices at which it sold to customers of its own selection in the same classification (10 C.F.R. §§ 212.31, 212.82, 212.83).

Section 210 of the 1970 Act[2] under which FEA issued its regulations provides that one charged more than the ceiling may sue and recover, and that recovery is to consist of treble the overcharge *or* not less than $100 nor more than $1,000, whichever is the greater—the treble or the dollar amount—*unless* the defendant affirmatively establishes as a defense that the overcharge was not intentional and resulted from a *bona fide* error.

More than a year after the last sale to it by Union, Ashland sued Union in the Northern District of California alleging that Union had charged it prices in excess of the FEA ceilings. Ashland's complaint repeated the same claim in two counts, in one praying for the difference between the alleged ceiling prices and the prices charged, in the other praying for three times the difference, plus, in each instance, attorney's fee. Upon Union's motion, the district court dismissed the action as one "upon a statute for a penalty or forfeiture" barred by the California one-year statute of limitations (quoted, p. 5 above).

On appeal, the Temporary Emergency Court of Appeals affirmed in part and reversed in part. It held that the California one-year statute did bar Ashland's prayer for treble the difference between the prices charged and the alleged ceiling but that the prayer for the difference was not barred.

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1. The case having been dismissed on the complaint, a copy of which is attached as Appendix D, we take the facts from its allegations.

2. Quoted, pp. 3-4 above.

REASONS FOR GRANTING THE WRIT

The court below has legislated, and it has justified its doing so by combining two courses of reasoning, each of which is in conflict with settled applicable decisions of this Court. Because all appeals under the federal statute here involved are channeled to the Temporary Emergency Court of Appeals, no conflict between circuits is possible, a factor peculiarly calling for certiorari under *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (a case singled out for attention in the Court's Rule 58(2)).

The starting point of the case is the fundamental rule that, in any suit on a cause of action created by federal statute, the statute of limitations of the state where the action is brought controls if, as here, Congress has not itself prescribed the period of limitations.[3] This case is one of a series coming to the Court in recent years where lower courts have disregarded, or litigants have sought to have them disregard, that settled rule, in order to apply some different period of limitations or no period at all, according to the court's notion of what it would have enacted had it been Congress, doing so on the basis of an imagined "national public policy" neither stated in the statute nor found in the legislative history.

The evil of the treatment given this case by the court below reaches far beyond an improper decision under a particular statute. The law is a "seamless web", and the evil consists of doing violence to principles pervading the whole fabric of jurisprudence

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3. For example, *Campbell v. Haverhill*, 155 U.S. 610 (1895) (Patent Act); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906) (Sherman Act prior to the passage of 15 U.S.C. § 15b in 1955); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *Rawlings v. Ray*, 312 U.S. 96 (1941) (National Bank Act); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966) (Section 301 of the National Labor Relations Act); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (Civil Rights Act of 1870); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. (1976) (Securities Exchange Act of 1934); *Runyon v. McCrary*, 427 U.S. 160 (1976) (Civil Rights Act of 1866).

and thus creating precedent to disjoint the law in innumerable other situations.

The district court and the court below concurred in holding that an action for treble damages is an action for a penalty and therefore subject to California's one-year period. The district judge, learned in California law,[4] also held that where a statute allows treble damages, even though it does not mandate them, it too is a statute for a penalty within the meaning of the California statute of limitations, and that any claim for unmultiplied damages created by the same statute is as much barred, under California law, as a claim for multiple damages.

The court below did not place its decision upon any disagreement with that understanding of California law. Instead, in a remarkably candid opinion, it took two other courses of reasoning, neither sufficient by itself to sustain its conclusion and neither valid.[5] It held that the applicable state statute may be ignored if, in the court's opinion, it would frustrate some "overriding national policy". It epitomized this course of reasoning thus (App., pp. 7-8):

> "[i]n determining whether a state statute of limitations will be applied to a federal right, courts must be guided by public policy expressed by Congress. Thus, there need not be applied a state limitation period which the court finds to be inconsistent with the federal policy involved."

4. The interpretation of state law by a federal judge sitting in that state, especially where the judge is a member of the bar of the state, as here, is given great weight. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

5. While determination of what a federal statute provides is for the federal courts, determination of what state statute of limitations applies to statutory claims of the kind thus determined to have been created by the federal statute is a matter of state law. *Leh v. General Petroleum Corp.*, 330 F.2d 288 (9 Cir. 1964), reversed on other grounds, 382 U.S. 54. If the court below had been either able or willing to say that the district court erred in holding that under California law the one-year statute applies to any claim created by a statute permitting treble damages, it could have disposed of this case on that basis without embarking on its two-pronged course of reasoning.

While the court cited *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, ... U.S. ....., 97 S.Ct. 2447 (1977), as support for this proposition, it acknowledged that *Occidental* and this case are quite different. In holding that no statute of limitations bars a suit brought by the Equal Employment Opportunity Commission, this Court had carefully explained that its decision turned upon the fact that Title VII of the Civil Rights Act of 1964 placed duties and obligations on the Commission and envisaged procedures by it inconsistent with any statute of limitations at all and that the history of the Act demonstrated that Congress did not intend state statutes of limitations to apply. Again candidly, the court below acknowledged that neither the pertinent Act in the present case nor its history contained anything comparable, for it said (App., pp. 8-9):

> "But dissimilarly, EPPA contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law, nor does our case directly involve enforcement of a public right by governmental action as did *Occidental Life*. There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitation provisions to apply or that state statutes of limitations should not be looked to in accordance with the general rule in the absence of express federal provision. Nor can anything be discerned to indicate that the relatively brief but not unusual period of limitation found in state law should not be applied to any claims in the nature of penalties."

Nevertheless, the court proceeded upon an assumption of a supposed "overriding national policy", without ever identifying it beyond the court's feeling that one year is too short a time for an action seeking non-multiple damages. But an "Act is the vehicle by which its purposes are expressed and carried out", *United Air Lines, Inc. v. McMann*, ... U.S. ....., 46 U.S.L.W. 4043, 4045 (Dec. 12, 1977). And a conclusion that a one-year statute of limitations would frustrate national policy is readily

shown to be fallacious. Section 210 of the Economic Stabilization Act, here involved, was modeled on the Defense Production Act of 1950 (64 Stat. 811, Ch. 932, § 409(c)), the price control act of the Korean conflict, which in turn was modeled on the price control act of World War II (Emergency Price Control Act of 1942 (56 Stat. 34, as amended, 58 Stat. 640)). In those acts Congress expressly required suit to be brought within one year "from the date of the occurrence of the violation". Thus Congress plainly showed that it did not regard a one-year period as frustrating public policy of an act setting price ceilings. And in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), brought under 42 U.S.C. § 1981 for employment discrimination, this Court held that a state one-year statute barred the action. Yet a policy so fundamental as prohibiting racial discrimination is either more vital or at least as vital as a price control policy. This Court specifically commented in *Johnson* (pp. 463-464):

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. * * * In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit * * * on the prosecution of a closely analogous claim."

The court below held that national policy is not frustrated by a three-year bar. At what point does a frustration occur? At 2, or only at 1? These are legislative questions, not judicial. As said by this Court in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 702-703 (1966),

> "Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, *there is no justification for the drastic sort of judicial legislation that is urged upon us.*"

And (at 701) it characterized a rejection of state law as so "bald a form of judicial innovation" and said (p. 704):

> "Against this background [of settled decision since *Campbell v. Haverhill*], we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits."

What is a reasonable period of limitations is a value judgment, and when Congress states no period of limitation itself, it accepts the value judgment of the state, not of the courts, and declares the national public policy to be that the state statute controls. So this Court held in the *Johnson* case.

No doubt there is a national public policy about price controls, stated in the statute and the regulations. But, as this Court said in *Johnson v. Railway Express Agency, supra*, there is no public policy about the period of limitations. It there said (p. 467, fn. 13):

> "We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. . . . The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court."

The result of the court's invoking "public policy" validates the oft quoted statement[6] of Lord Burrough in *Richardson v. Mellish*, 2 Bing. 229, 252, 130 E.R. 294, 303, that:

> ". . . public policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

Having rejected California's one-year period on "policy" reasons, having mounted that "unruly horse", and realizing that

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6. Quoted, for example, in *Dixie Machine Welding & Metal Works v. United States*, 315 F.2d 439, 441 (5 Cir. 1963).

something more solid was needed than to pick a different time period out of the air, the court below embarked on its second course of reasoning, which led it away from "sound law". It proceeded *as if* the federal statute on which the action is based creates two separate causes of action, because, so it said, Ashland's alternative prayers for relief involved "essentially different combination of elements", giving rise to two "rights of action". This is how it characterized the provision of the statute that treble damages are defeated if the defendant affirmatively establishes that the overcharge was not intentional or was the result of *bona fide* error, but single damages are not. The court then analogized the *remedy* of "single damages" to a *cause of action* on a non-penal statute, to which California applies a three-year period. Its opinion does not claim that it follows California law; it asserts only that it is "not inconsistent with California law" (App., pp. 12, 13). It had no choice but to refrain from asserting that it was applying California law because, while it is *possible* for the legislative authority to direct different periods of limitation at different *remedies* or types of *relief*, California has not done that. California's limitations are always applied to the "*cause of action*" (Cal. Code Civ. Proc. § 312, quoted at p. 5 above), never to *remedies* or *relief* (see p. 15n below).

It is here that the court has run counter to a most basic and pervasive principle. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), settled that there is only one cause of action where a single primary right has been violated. There, in a first suit, one who had suffered personal injuries sought recovery on a claim that appliances were defective. In a later suit, he claimed that his injury was caused by negligent operation of the appliances. This Court held the second suit barred by the judgment in the first because there was "a single wrongful invasion of a single primary right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex." *Baltimore S.S.*

Co. v. Phillips has been repeatedly cited by this and other courts in a variety of contexts. For example, it has repeatedly been the basis of holdings of *res judicata*. *E.g., Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 467-68 (3 Cir. 1950), *cert. denied* 341 U.S. 921 (1951); *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695 (7 Cir. 1947), *cert. denied*, 332 U.S. 810.[7]

This same principle is the basis of decisions which expand federal jurisdiction in one direction and contract it in another. Starting with *Hurn v. Oursler*, 289 U.S. 238 (1933), and burgeoning in *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), it is the foundation of "pendent jurisdiction". The same principle has imposed a wide limitation on removability of suits from state to federal courts, *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("The single wrong for which relief is sought is the failure to pay compensation for the loss on the property.").

In the present case, right of any recovery, single or treble, exists only by virtue of § 210 of the Act, which, as we have seen (pp. 3-4 above) provides that one charged more than the ceiling price may sue and recover. The primary right is the right not to be "overcharged". The single damages and the treble damages, the arbitrary $100.00 to $1,000.00, the award of attorney's fees, constitute different remedies; they do not constitute different causes of action. A plaintiff's prayer "forms no part of the cause of action." *Unanue v. Caribbean Canneries, Inc.*, 323 F.Supp 63, 67 (D. Del. 1971).

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7. In *F. L. Mendez* plaintiff claimed wrongful cancellation of a contract right to purchase automobiles; in the first suit, the wrong was said to be a violation of the Clayton Act; in the second, participation in a conspiracy in violation of the Sherman Act. The court said: "It [plaintiff] has one right and one only; the right to enjoy its contract. It complains of one wrongful act, namely, deprivation of that right . . . The gist of its action is its injury arising from alleged wrongful deprivation of its contract right." (P. 698).

The very essence of *Baltimore S.S. Co. v. Phillips, supra,* and the innumerable decisions proceeding on the primary right concept show that the distinction made by the court below about "different combination of elements" is wholly untenable. This Court taught in *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 224-225 (1958), a statute of limitations case, that where there is a single wrongful invasion of a single primary right, there is only one cause of action even though the plaintiff may have differing "means of recovery" which are "varied in their elements of proof, type of defenses, and extent of recovery." And as the Court held in *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 443-444 (1943), a single injury does not "give rise to two causes of action merely because recovery" is permitted under different statutes each affording "a different measure of recovery." Or, as observed in *McMahon v. United States,* 186 F.2d 227, 230 (3 Cir. 1950), where plaintiff was held barred by limitations even though his "right of action" had not been perfected by procedural steps, there is ". . . a distinction between a cause of action and the right of action thereon . . . . A cause of action is a legal wrong, the thing which becomes a ground for suit."

As the district court correctly observed (App., p. 17), a plaintiff under the Act involved in this case has no choice about whether to seek multiple damages or single. His suit is for what the Act allows. The decision of the Emergency Court of Appeals allows a plaintiff, barred from the remedy of multiple damages, to absolve defendant from the burden of establishing its defense of non-intentional overcharge or *bona fides,* thereby permitting the plaintiff to create a different cause of action from what Congress created. A plaintiff should not be able to restructure the cause of action, saying "I waive the trebling and ask only for single damages," and thereby escape the bar of limitation.

The "primary right" understanding of a cause of action is not only basic in decisions of this Court, it is settled California law.

Wulfjen v. Dolton, 24 Cal. 2d 891, 151 P.2d 846 (1944), where the California Supreme Court said ((pp. 895-896):

> "The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."[8] [Emphasis in original]

The very purpose of creation by § 210 of the Economic Stabilization Act of a private cause of action was penal. That act originated in 1970 as a criminal statute, providing the "penalty" of a fine in § 204 (84 Stat. 800), carried forward into § 208 by the 1971 amendments (85 Stat. 747), and today appearing in 89 Stat. 949 (15 U.S.C. § 754(a)(3)). As remarked by the court below in *Longview Refining Company v. Shore,* 554 F.2d 1006, 1012 (T.E.C.A. 1977), "there can be no doubt that section 208(a) is essentially criminal in nature." Both the Senate Report and the House Report on the statute adding § 210 in 1971 (85 Stat. 743, 748), quoted in footnote 11 of the court's opinion (App., p. 9), emphasize that the purpose was to assist the enforcement of the criminal statute by ferreting out violators and deterring would-be violators. Deterrence is one of the traditional aims of punishment. Other panels of the court below have extended this observation to § 210(b), characterizing it as penal, designed to punish acts essentially criminal in nature, *e.g., DeRieux v. Five Smiths, Inc.,* 499 F.2d 1321, 1338 (T.E.C.A. 1974), *cert. denied,* 419 U.S. 896:

> "Thus, the damages available under § 210(b) are punitive in nature * * *
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> * * *

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8. This principle is applied in California, not only for *res judicata, Ford Motor Co. v. Superior Court,* 35 Cal.App.3d 676, 679, 110 Cal. Rptr. 59, 61 (1973) but for purposes of the statute of limitation: "[T]he statute of limitations to be applied is determined by the nature of the right sued upon, not by the . . . relief demanded." *Day v. Greene,* 59 Cal.2d 404, 411, 29 Cal.Rptr. 785 (1963).

"Even though such an award is discretionary with the district court, its prospect above might have caused the Falcons to order their conduct differently so as to avoid the risk. * * *

"This conclusion is fortified by the deterrent purpose of § 210, above referred to."

In support of its statement that its conclusion is "not inconsistent with California law" (App., pp. 12-13), the court below cites cases concerning statutes of limitation which do not support it (App., p. 13). All but one are of situations where a cause of action for single damages already existed at common law, independent of the penalty created by statute.[9] Barring the penalty of multiple damages created by statute did not bar the pre-existing common law cause of action. But here there was no such thing as an "overcharge" except as created, not only by the Act, but by the very same sentence of the very same section of the Act as created the right to recover multiple damages. The court's opinion therefore falls back on an analogy to a supposed indication in *Stone v. James,* 142 Cal.App.2d 738, 299 P.2d 305 (1956), not a case of multiple and single damages. There, one section of a statute provided that a conditional purchaser on installments could pay off the whole debt at any time and should then have a refund of prepaid but unearned interest; an entirely different section of the Act provided for forfeiture of the principal. Concerning an argument that there was a right to recover unearned interest even where the right to forfeit the principal was barred, the court remarked that "appellant may well be right" but dismissed the argument as irrelevant because the claim was barred anyway. The court's comment about "may well be

9. For example, for injury to one's realty a common law action for trespass always existed; California statute created a new cause of action where the injury consisted of cutting down trees. *United States v. Magnolia Motor & Logging Co.,* 208 F.Supp. 63 (N.D.Cal. 1962).

right" was thus not even dictum; it was mere rumination. The court below errs in suggesting that there is no contrary ruling by the California Supreme Court. The rumination in *Stone v. James* gives way to the later decisions of *Ford Motor Co. v. Superior Court,* 35 Cal.App.3d 676, 110 Cal.Rptr. 59 (1973) and *Day v. Greene,* 59 Cal.2d 404, 29 Cal.Rptr. 785 (1963), both cited in fn. 8, *supra,* and it is inconsistent with this Court's decision in *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221 (1958), discussed at p. 14 above.

The regulations of the FEA, now the Department of Energy, denying one the right to select its own customers and fixing prices, are harsh. So long as they are within the authority granted by Congress, doubtless the harshness may be said to represent "national public policy". But the defense of limitations is "favored in the law" (*Wood v. Carpenter,* 101 U.S. 135, 139), and the harsh impact of the regulation should not be augmented by the personal view of judges fortuitously empaneled to hear a particular cause of what period of limitations is desirable.

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: January 11, 1978.

MOSES LASKY

Moses Lasky
Attorney for petitioner

(Appendices follow)

Appendix A

Temporary Emergency Court of Appeals
of the United States

No. 9-38

Ashland Oil Company of California
Plaintiff-Appellant,
v.
Union Oil Company of California; and
Department of Energy,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of California

(No. 77-0607-CBR)

(Argued October 28, 1977 Decided December 12, 1977)

ALFRED LAWRENCE TOOMBS, Batzell, Nunn & Bode, Washington, D.C., with whom William H. Bode of the same firm; and Robert L. Dunn, Bancroft, Avery & McAlister, San Francisco, California, were on the brief for the Plaintiff-Appellant.

MOSES LASKY, Brobeck, Phleger & Harrison, San Francisco, California, with whom John E. Munter and Forrest A. Hainline, III, of the same firm, were on the brief for the Defendants-Appellees (Union Oil Company of California).

ROBERT E. RICHARDSON, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General and Gerald D. Freed, were on the brief for the Defendants-Appellees (Department of Energy).

Before CARTER, CHRISTENSEN and JAMESON, Judges.

CHRISTENSEN, Judge:

The question presented in this case involves the period of limitations to be applied to an action for overcharges on sales of petroleum products.

On March 23, 1977, plaintiff-appellant, Ashland Oil Company of California ("Ashland"), filed suit in the United States District Court for the Northern District of California against Union Oil Company of California ("Union") and the Federal Energy Administration ("FEA")[1] alleging that Union charged prices for petroleum products sold to Ashland during the period of January 1975 to February 1976 in excess of those permitted by FEA's Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212.[2] Ashland's action is based on Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754 (a)(1), which incorporates § 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 note.[3] Our appellate jurisdiction as to such

1. Initially and for the purposes of this appeal FEA was named as a party in response to the admonition of Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977) and prior decisions of this court with respect to § 210 actions. While this case was pending on appeal the Department of Energy (DOE) was substituted for the FEA pursuant to Public Law 95-91 (August 4, 1977) and Executive Order 12009 42 F.R. 46267 (Sept. 13, 1977), which created the Department of Energy as of October 1, 1977. Pursuant to the Act the duties, functions and responsibilities of FEA have been assumed by DOE.

2. Basically, these FEA regulations prohibit a refiner from charging to any class of purchaser a price for petroleum products in excess of the weighted average price at which such products were lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus certain increased costs.

3. Section 210 provides:

Section 210. *Suits for damages or other relief.*

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States. . . .

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, that where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

actions rests in view of 15 U.S.C. § 754(a)(1), *supra*, upon § 211(b)(2) of ESA, as amended.

Union is a refiner of motor gasoline and other petroleum products. Ashland alleges that it belonged to the class of purchaser composed of non-branded independent marketers which are independent wholesale purchaser-resellers, and that Union placed Ashland into a different class of purchaser and thereby charged it prices up to and including February, 1976, at least 5.5 cents higher than those charged to other members of the purchaser class to which Ashland actually belonged. The complaint is divided into two claims or "causes of action", the first for the recovery of actual overcharges, the second for treble damages on the theory of "intentional" overpricing, with attorney's fees sought on each claim. On August 16, 1976, Ashland filed with Union a statutory claim for refund pursuant to the last sentence of § 210(b). The ninety day waiting period elapsed without a refund from Union. Ashland commenced this action on March 23, 1977, more than a year after its claims accrued.[4]

4. Ashland contended in the district court that its claims did not accrue until its actual discovery of the overcharges, a position properly rejected below and not pressed here apart from the issue of fraudulent concealment. The latter issue was only tangentially discussed by the trial court: "And I think on the basis of your president's affidavit it's clear that they were aware of the . . . overcharge and its extent prior to the bar of the statute of limitations, and the fact that they didn't file is . . . just one of those unfortunate things that happens all the time." The point was missed by the trial court that fraudulent concealment could extend a period of limitations beyond its normal termination even though that time had not

FEA filed an answer denying knowledge or information sufficient to form a belief as to the truth of Ashland's critical allegations of fact and Union filed a motion to dismiss for failure of the complaint to state a claim on which relief could be granted, F.R.Civ.P. 12 (b)(6).[5] Union's motion was based on the contention that Ashland's action for both actual overcharges and treble damages was barred as a matter of law by the California statute of limitations, section 340(1), California Code of Civil Procedure. That statute prescribes a one year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture."[6] Union's motion was granted by the trial court on June 23, 1977, and on June 24, 1977, final judgment was entered dismissing Ashland's action in its entirety with prejudice, costs to Union.[7]

fully expired before the concealment was discovered. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874). This point becomes immaterial in view of our ruling hereafter that there was no fraudulent concealment.

The contention suggested by Ashland to the trial court that its claim for reimbursement for overcharges did not accrue until the expiration of the 90 day notice required by § 210, *supra,* has been abandoned on this appeal.

5. In connection with Ashland's argument that it had not discovered the overcharges until more than a year after they were made, it filed and the court considered the affidavit of its president, thus invoking Rule 56 by virtue of the last sentence of Rule 12(b).

6. Section 338(1), Cal.C.C.P., provides a three year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture."

7. The judgment was entered without written opinion. However, the court's principal reasoning is evident in the following excerpts from the transcript of its oral decision:

> "The Court: . . . where there is a private action provided for in the federal statute, and there is no statute of limitations, that I think you then have to go to the applicable state statute of limitations, and I think it's very clear in the State of California, it's 340.1.
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> . . . .
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> ". . . You see, the thing is, I really don't believe that—that it was contemplated, or that a court would hold that you have on year within which to file after the claim arises, if you're seeking trebling, and you have three or four or five or some other period to file, if you're seeking single damages. I just don't think so. I think you've got one claim here, and that one claim, depending upon the circumstances, may entitle you to the trebling of the amount of the overcharge.
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> . . . .
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> ". . . But to me it's clear there's only one statute of limitations for the claim, even though the possibility of trebling exists and I think under Leh [Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds,* 382 U.S. 54 (1964)], I look to the state statutes, and regardless of Holland [Holland v. Nelson, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970)], it seems to me that this is in effect, where the possibility of trebling occurs, is in the nature of a penal statute, and that the one-year statute of limitations under 340.1 is applicable."

Ashland filed a timely notice of appeal to this court on July 22, 1977.

It is contended in support of this appeal that the district court erred in dismissing the entire action because California's three year statute of limitations should be held to govern at least the claim for the recovery of actual overcharges as "[a]n action upon a liability created by statute, other than a penalty of forfeiure," Cal.C.C.P. 338(1). In the alternative, Ashland would have this court apply California's three year statute of limitations to both counts of its complaint. Finally, Ashland argues that the doctrine of fraudulent concealment sustains both counts of the complaint, since Union allegedly "concealed" the existence of the improper classification until within a year of the filing of its complaint. We first address the latter point.

I

Even though California's statute of limitations applies in this case, any issue relating to accrual and tolling is governed by federal law. Cope v. Anderson, 331 U.S. 461, 464 (1946); Rawlings v. Ray, 312 U.S. 96, 98 (1940). Where acts causing injury are fraudulently concealed from the injured party or where fraud furnishing the basis of an action is of such nature as to conceal itself, a statute of limitations is tolled until the injured party

discovers, or with due diligence could have discovered, the injury. Holmberg v. Armbrecht, 327 U.S. 392 (1945); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875), *supra*; American Pipe & Construction Co. v. Utah, 414 U.S. 538. It is clear, however, that mere ignorance on the part of a plaintiff is not sufficient. Wood v. Carpenter, 101 U.S. 135, 143 (1879).

In support of its claim of fraudulent concealment Ashland argues that by their very nature, violations of the type alleged herein are not self-revealing and that it had insufficient knowledge of the foundations of a claim to start the statute running.[8]

Appellant has misconceived the governing law. To support the result contended for plaintiff would have to establish either that the defendant fraudulently concealed the conduct forming the basis of the claim or that the defendant's conduct by reason of its fraudulent nature was inherently self-concealing. The fact that FEA pricing regulations involve complicated accounting processes and that price information resulting from those processes is not "self-revealing" is not enough to sustain a claim of fraudulent concealment, nor is any mere failure on Union's part to publish price information that it was not required otherwise to publish.

We do not determinatively fault Ashland's position merely because of its failure to plead with particularity the circumstances constituting the claimed fraudulent concealment, or even to mention such a claim in its complaint.[9] The trial court considered

8. Ashland asserts that in order to determine if Union was in compliance with the FEA pricing regulations Ashland must have discovered: (1) the names of each other member of the relevant class of purchaser; (2) the May 15, 1973, price charged to each such applicable purchaser; (3) the volume of each such purchaser on May 15, 1973; and (4) Union's cumulative increased costs for the period in question. This information it is said is not published anywhere, and in fact is considered confidential by the FEA, and hence the running of the statute should be deemed tolled until the time Ashland actually discovered the alleged overcharges.

9. But see F.R.Civ.P. 9(b). See also Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975); Weinberger v. Retail Credit Co., 498 F.2d 552 (4th Cir. 1974); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974).

as on summary judgment as we heretofore observed the affidavit of Ashland's president in resistance to the motion to dismiss, and any defective pleading could be deemed supplemented for the purposes of our present inquiry by the substance of this collateral showing. Ashland's trouble on the point is that the affidavit not only failed to support Ashland's position on the issue of fraudulent concealment but tended affirmatively to further demonstrate its lack of merit.[10] No tolling having occurred in view of the uncontroverted facts of record, we proceed to consider the period or periods of limitation applicable to plaintiff's complaint.

II

Neither the EPAA nor § 210 of the ESA contains a limitation provision. Generally in the absence of a statutory limitation provided by Congress, a federal court will apply the most analogous state law of limitations. *E.g.*, Runyon v. McCrary, 427 U.S. 160, 179-80 (1976) (Civil Rights Act of 1866); Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-05 (1966) (Labor Management Relations Act); O'Sullivan v. Felix, 233 U.S. 318, 322-23 (1914) (Civil Rights Act of 1871); Chattanooga Foundry & Pipeworks v. Atlanta, 203 U.S. 390, 397 (1906) (Sherman Act); Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895) (Patent Act). However, in determining whether a state statute of limita-

10. The affidavit of Ashland's president, Walter J. Simas, submitted in opposition to Union's motion to dismiss, states that in June, 1976, Ashland employed special counsel to investigate the pricing practices of all its major suppliers. Approximately one month later, in July, 1976, Ashland was advised that Union had placed Ashland in an improper class of purchaser and had thereby overcharged Ashland for petroleum products. Such allegations do not document a claim of due diligence, and indeed these facts appear contrary to any theory of due diligence for, within a month after special counsel began its investigation, the existence of the alleged overcharges was discovered. See Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

tions will be applied to a federal right, courts must be guided by the public policy expressed by Congress. Thus, there need not be applied a state limitation period which the court finds to be inconsistent with the federal policy involved.

The Supreme Court recently stated in Occidental Life Insurance Co. v. EEOC, 97 S.Ct. 2447, 2455 (1977), in refusing to limit the rights of the government by a state statute of limitations:

> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state laws will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson v. Railway Express Agency,* 421 U.S. 454, 465 [(1974)]. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

As with the equal employment opportunity statute with which *Occidental Life* was concerned there is strong national policy expressed in the EPAA. But dissimilarly, EPAA contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law, nor does our case directly involve enforcement of a public right by governmental action as did *Occidental Life.* There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitation provisions to apply or that state statues of limiations should not be looked to in accordance with the general rule in the absence of express federal provision. Nor can anything be discerned to indicate that the relatively

brief but not unusual period of limitation found in state law should not be applied to any claims in the nature of penalties.

The national policy otherwise expressed in § 210 and its legislative history yet is instructive, for it tends to repel the extreme view taken by each of the parties—Ashland's that California's three-year limitations period and Union's that its one-year period should be applied indiscriminately to both claims of the complaint. While there is public policy clearly evident to provide both remedy for and deterrence against the violation of pricing regulations,[11] the Congress made it equally clear that the recovery of treble damages in the nature of a penalty for violating those regulations would involve more stringent proof of additional elements than that warranting the award of merely compensatory relief.[12]

We have concluded that the national policy can best be harmonized with the state statute of limitations by applying the one

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11. The absence of congressional debate on whether to add § 210 of ESA to EPAA underscores the importance which was attached to the addition of the private remedies provided by the former. The lack of extensive government machinery to police the price regulations coupled with their emergency nature and complexity made the role of private actions critical. The House Report with reference to § 210 stated:

> The Committee, in line with the Administration's emphatic request for voluntary surveillance to assure compliance with price and rent regulations and orders, adopted this section so that it would serve not only to provide a means to recover losses, but would provide a strong deterrent to those who would willfully violate this Act.

H.R. Rep. No. 92-714, 92nd Cong., 1st Sess. (1971). From the Senate Report:

> Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against a violator.

Senate Rep. No. 92-507, 92nd Cong., 1st Sess. (1971).

12. Section 210 draws clear distinction between remedial recovery of overcharges and treble damages for intentional violations in the nature of a penalty beyond compensation; and for each claim there is specified a prerequisite not applicable to the other. See Manning v. Univ. of Notre Dame Du Lac, 484 F.2d 501 (TECA 1973).

year bar to Ashland's second claim, and allowing maintenance of the first claim as an action other than for a penalty. Any other result, we believe, would be inconsistent with the most persuasive local interpretation of the California statute of limitations. We further are of the opinion that overriding national policy would require us to comport any variance or uncertainty in the California rule to the indicated result.[13] In ascertaining what state statute of limitations should be applied to federally created claims, a federal court will accept the state court interpretations of the state's limitations statute, but the nature of the claims presented will be determined by federal law. Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961), *supra*; Bertha Building Corp. v. National Theatres Corporation, 269 F.2d 785, 788 (2d Cir. 1959); see also, Auto Workers v. Hoosier Corp., 383 U.S. 696, 706 (1966), *supra.*

The California Code of Civil Procedure specifies two limitation periods the applicability of which must be considered in the light of national policy and particularly in view of the provisions of § 210 of ESA. Section 338 (1) provides a three year limitation for "[a]n action upon a liability created by statute, other than for a penalty or forfeiture" and § 340(1) mandates a one year limitation for "[a]n action upon a statute for a penalty or forfeiture." Section 210 expressly provides for both compensatory damages and exemplary damages, drawing a clear distinction, as

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13. See Auto Workers v. Hoosier Corp., 383 U.S. 696, 705-06 (1966), *supra*:

> The Union argues that if the timeliness of this action is to be determined by reference to Indiana statutes, federal law precludes reference to the Indiana six-year provision governing contracts in writing.
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> . . . .
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> We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. But there is no reason to reject the characterization that state law would impose unless the characterization is unreasonable or otherwise inconsistent with national labor policy.

we have noted.[14] TECA has considered in different context the distinction between an action for actual damages and one for treble damages[15] in three prior cases[16] but has not yet found it necessary to consider the distinction, if any, between the terms "intentional" and "wilful" as employed in different parts of § 210. Nor do we consider it essential to do so now. Whether for wilful or intentional overcharging, or both, the award of treble damages pursuant to § 210 would be in the nature of a penalty within the contemplation of California law.

The California courts have held actions for damages beyond or without reference to actual loss to be actions for a "penalty

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14. The gist has been fairly summarized:

> Compensatory relief, i.e., refund of the amount of overcharge, is available in all cases of overcharge provided that, except in the case of willful overcharges, the purchaser requested and did not receive a refund from the overcharging seller within 90 days of such request. Exemplary damages, i.e., the greater of treble damages or $100 to $1,000, are available at the discretion of the court in cases where the overcharge was intentional and not the result of bona fide error. These are two different rights of action distinguishable as to the elements that must be proved in order to be granted relief. (FEA Br. p. 9.)

15. Union contends that § 210 provides two remedies, but only one "cause of action." However, this argument disregards the essentially different combination of elements required for claims as they were separately stated in conformity with Rule 8(e)(2), F.R.Civ.P. Union further asserts that the entire section is a penal statute inasmuch as ESA was originally enacted as a criminal statute and the amendments allowing civil recovery were designed to assist the enforcement of the criminal provision by deterring and punishing violators of the price regulations. We reject this reasoning.

16. Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977); Evans v. Suntreat Growers & Shippers, Inc., 531 F.2d 568 (TECA 1976); Manning v. Univ. of Notre Dame Du Lac, 484 F.2d 501 (TECA 1973), *supra.* See also DeRieux v. 5 Smiths, Inc., 499 F.2d 1321, *cert. denied,* 419 U.S. 896 (1974). Union contends that *DeRieux* indicates that the potential for treble damages under § 210 renders all actions under that statute penal in nature. However, the issue presented in *DeRieux* concerned the retroactivity of § 210 where the plaintiff was suing for treble damages. The court did not discuss an action for actual damages under § 210.

or forfeiture". County of San Diego v. Milotz, 46 Cal. 2d 761, 300 P.2d 1 (1956); Heesy v. Vaughn, 31 Cal. 2d 701, 192 P.2d 753 (1948); Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297 (1943); see also Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds,* 382 U.S. 54 (1965). Clearly a claim for treble damages in reliance upon § 210 is within this definition.

However, to apply the one year statute to an action for actual damages would be inconsistent with the express terms of § 210 and its underlying policy. An action for compensation logically is not "[a]n action upon a statute for a penalty or forfeiture." In the past TECA has noted the complexity of the price regulations and the difficulty of determining compliance therewith. *See Longview, supra,* and *Evans v. Suntreat, supra.* Given this complexity, it would be especially unreasonable to bar gratuitously an action for reimbursement of overcharges on the basis of the one year statute of limitations. The logical, indeed express, applicability of California's three year statute of limitations to the claim for overcharges must be recognized.[17]

III

Our conclusion that a § 210 claim for actual damages is controlled by § 338(1) while a claim for treble damages is barred

17. Union would have us read § 340(1) of the California statute as if it provided that "any action in reliance upon a statute providing liability for a penalty alone or with other types of liability shall be brought within one year." It is much less strained and reasonable to read it as providing that "any action to recover a penalty created by statute shall be brought within one year." We are not impressed with the argument that on some unitary theory a claim not presenting foundations for recovery of a penalty and not seeking any penalty must be deemed nonetheless an action for a penalty, and that notwithstanding the separation of essentially different claims in a complaint as provided by Rule 8(e)(2), F.R.C.P., the failure of one by reason of a statute of limitations necessarily entails the failure of both. Nor do we find convincing the idea that the use of the term "action" in the California statute precludes separate consideration of each of Ashland's claims as actions. Neither would be any less or more a separate action if standing alone in a complaint.

in accordance with § 340(1) is not inconsistent with California law. In United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63 (N.D. Cal. 1962), it was held that Cal.C.C.P. Section 340(1) barred the United States' action for treble damages, but not for actual damages. In Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15 (1950), and Porter v. Arthur Murray, Inc., 249 Cal. App. 2d 410, 57 Cal. Rptr. 554 (1967), actions for treble damages were dismissed; however, the plaintiff was allowed to recover for "money had and received". *See also,* Beck v. Arthur Murray, Inc., 245 Cal. App. 2d 976, 54 Cal. Rptr. 328 (1966). (The court indicates that the plaintiff might recover actual damages even though a claim for treble damages may ultimately be denied.)

Union attempts to distinguish these cases on the ground that in them the right to single damages existed at common law, whereas Ashland's action for actual damages is dependent on § 210. We need not pursue the possibility that the recovery of overcharges could be deemed as a pendant claim in the nature of a common law count for money had and received to avoid such distinction. In Stone v. James, 142 Cal. App. 2d 738, 299 P.2d 305 (1956), the court indicated that a statutory right to recover prepaid finance charges was governed by a two year statute of limitations, although an action under the statute for the entire purchase price was in the nature of a penalty and therefore governed by § 340(1).[18] This case in the absence of a ruling by

18. The plaintiff in *Stone* sued under California's Civil Code § 2982, subdivisions (d) and (e). Subdivision (d) of that statute provided that a buyer of a motor vehicle under a conditional sales contract could pay off the entire debt at any time prior to its maturity. In that event the buyer would be entitled to receive a refund credit for any prepaid finance charges less certain adjustments required by the statute. If the seller failed to refund any prepaid finance charges subdivision (e) provided that the buyer could recover the total amount paid under the contract. The court held that subdivisions (d) and (e) of Section 2982 were severable. Subdivision (e) was held to provide for a penalty, barred by § 340(1). The court did not question that an action to recover prepaid finance charges under subdivsion (d) would be governed by the longer period of two

the California Supreme Court to the contrary is at least persuasive of California law. Cf. West v. American Tel. & Tel. Co., 311 U.S. 223 (1940), and Six Companies of California v. Joint Highway District No. 13, 311 U.S. 179 (1940).

Ashland argues on the basis of Holland v. Nelson, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970), that California's three year statute of limitations should be applied to its claim for treble damages as well as to that for compensation. In *Holland,* it was held that the one year limitation for a statutory penalty or forfeiture applied neither to the plaintiff's claim for actual damages nor to that for treble damages. The court reasoned that the option of awarding exemplary damages did not convert the statutory right of action for either single or treble damages into one for a penalty.[19]

The *Holland* case is contrary to the weight of California authority concluding that statutes permitting recovery in excess of actual damages are penal in nature.[20] Thus, although the

years. However, since the complaint was filed more than two years after the sales transaction at issue occurred, a demurrer to the entire action was sustained.

19. The *Holland* court stated:

> [T]he provision in Civil Code, Section 1812.62, allowing to the court the option of granting judgment for treble damages, is not to be construed as converting the statutory right of action into one for penal damages. To adopt the contrary construction would either apply a shorter period of limitation than that established by Code of Civil Procedure section 338, subdivision (1), for actions on other statutory liabilities or would put a plaintiff in the position of being unable to determine which statute of limitations applies to his cause until, after trial, the court determined in its discretion whether to allow treble damages.

85 Cal. Rptr. at 119.

20. For example, the California Welfare and Institutions Code § 2223 provides for a discretionary award of double damages. In Dept. of Social Welfare v. Stauffer, 56 Cal. App. 2d 699, 133 P.2d 692 (1943), California's one year statute of limitation was held to apply to an action under § 2223 for double damages. *See also,* Dept. of Social Welfare v. Wingo, 77 Cal. App. 2d 316, 175 P.2d 262 (1946). California's Usury Act of 1919 provided for a discretionary award of treble the usurious interest. This provision has been held to be a statutory penalty. Penziner v. West

Holland court was correct in concluding that a claim for actual damages is not one for a penalty, we decline to accept the distinction it would draw between a mandatory and permissive award of treble damages with reference to the applicable limitation period.[21] The preponderance of California law establishes that an award in excess of compensatory damages, whether discretionary or not, is to be considered a penalty for the purposes of its limitations statute.

IV

We conclude in sum that the district court erred in dismissing Ashland's claim for actual damages. Such a separate claim for actual loss is not "[a]n *action* upon a penalty or forfeiture." Cal.C.C.P. § 340(1). To hold otherwise would be at variance with the express provisions of § 210, creating alternative rights of action against violators of price regulations dependent upon a different combination of elements, and through an illogical shortening of the period of limitations with respect to non-penalty claims would unjustifiably frustrate congressional policy underlying § 210 for the encouragement of private surveillance of price regulations. The district court was correct in dismissing Ashland's claim for treble damages which as distinguished from the first claim clearly was for a penalty.

Affirmed in part, reversed in part, and remanded for further proceedings in harmony with this opinion.

IT IS SO ORDERED.

American Finance Co., 10 Cal. 2d 160, 72 P.2d 252 (1937); Esposti v. River Brothers, Inc., 207 Cal. 570, 279 P. 423 (1929). Other cases where the discretionary award of treble damages was termed penal in nature include Gwinn v. Goldman, 57 Cal. App. 2d 393, 134 P.2d 915 (1943), and Swall v. Anderson, 60 Cal. App. 2d 825, 141 P.2d 912 (1943).

21. Ashland's ambivalence between claimed severability of its action to realize its compensatory claim and asserted inseparability of the statutory limitation to rescue its discretionary treble damage count has not dispelled our support of the former position nor served to enlist our acceptance of the latter.

Appendix B

Temporary Emergency Court of Appeals of the United States

No. 9-38

Ashland Oil Company of California,
Plaintiff-Appellant,
v.
Union Oil Company of California,
and
Department of Energy,
Defendants-Appellees.

Before Honorable James M. Carter, Honorable A. Sherman Christensen, and Honorable William J. Jameson, Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of California and was argued by counsel.

Upon consideration whereof,

IT IS ORDERED that the judgment of said court is affirmed in part, reversed in part, and remanded for further proceedings in harmony with the opinion.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

December 12, 1977
District Court No. 77-0607 CBR

Appendix C

Excerpts From Reporter's Transcript of the Proceedings of June 23, 1977 in The District Court

"THE COURT [addressing Ashland's counsel] * * * Let me ask you this: What about—you distinguish between—don't you divide your cause of action seeking single damages and treble damages? Don't you have just one claim for overcharge, and then if there is an overcharge, then you have, under the statute, the alternative of either getting your single value of the overcharge, or the courts may treble it? Isn't that all you have?

"Mr. Toombs [counsel for Ashland]: We have pleaded two causes of action, your Honor. The first cause of action seeks—

"THE COURT: I know you plead two causes of action. That's why I asked the question. But don't you know you only have one cause of action, and that's for the overcharge, and that, depending on the circumstances, you may either get the single value of the overcharge or you get a treble?

* * *

"THE COURT: We're not talking about a California state claim, are we really? We're talking about a federal statute claim.

"Mr. Toombs: Yes.

"THE COURT: There's no basic claim for overcharge, other than the basis for—

"Mr. Toombs: But we're—

"THE COURT: —statute, don't you think?

* * *

"THE COURT: You see, the thing is, I really don't believe that—that it was contemplated, or that a court would hold that you have one year within which to file after the claim arises, if you're seeking trebling, and you have three or four or five or some other period to file, if you're only seeking single damages. I just don't think so. I think you've got one claim here, and that one claim, depending upon the circumstances, may entitle you to the trebling of the amount of the overcharge."

Appendix D

Robert L. Dunn
Bancroft, Avery & McAlister
240 Stockton Street
San Francisco, California 94108
(415) 892-7526

William H. Bode
Batzell, Nunn & Bode
1523 L Street, N. W., Suite 600
Washington, D. C. 20005
(202) 393-8535

Attorneys for Plaintiff

Original Filed March 23, 1977
William L. Whittaker
Clerk, U. S. Dist. Court
San Francisco

United States District Court
Northern District of California

Civil Action No. C77 0607 CBR

Ashland Oil Company of California
1436 Fourteenth Avenue, Oakland, California 94606,
Plaintiff,

v.

Union Oil Company of California,
Union Oil Center, Los Angeles, California 90017,
and
Federal Energy Administration,
Federal Building, 12th & Pennsylvania Ave., N.W.,
Washington, D. C. 20461,
Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

(Violation of Mandatory Petroleum
Price Regulations, 10 C.F.R. Part 212)

The above-named plaintiff files this Complaint against the above-named defendants and, demanding trial by jury, alleges as follows:

I. *Introduction*

1. This is an action to recover price overcharges, treble damages and attorneys' fees resulting from sales of motor gasoline by defendant, Union Oil Company of California ("Union"), to plaintiff, Ashland Oil Company of California ("Ashland"), at prices in excess of those permitted by the Regulations (see definition, ¶ 4(a), *infra*).

II. *Jurisdiction and Venue*

2. The jurisdiction of this Court is based upon Sections 210 and 211(a) of the Economic Stabilization Act (see definition, ¶ 4(a), *infra*); upon Section 5(a)(1) of the Emergency Petroleum Allocation Act (see definition, ¶ 4(b), *infra*); and upon 28 U.S.C. § 1331(a).

3. Venue is based upon 28 U.S.C. §§ 1391(b), (c) and (e), in that the claim and cause of action arose in part in this district and the corporate defendant is doing business in this district.

III. *Definitions*

4. As used in this Complaint:

(a) The "Economic Stabilization Act" and the "ESA" mean the Economic Stabilization Act of 1970, 84 Stat. 799, as amended and reenacted by the Economic Stabilization Act Amendments of 1971, 85 Stat. 743, as further amended, as in effect on November 27, 1973 and as so incorporated by reference into Section 5(a)(1) of the Emergency Petroleum Allocation Act. *See* 12 U.S.C.A. § 1904, note (1976 Pocket Part).

(b) The "Emergency Petroleum Allocation Act" and the "EPAA" mean the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751, *et seq.*

(c) The "Regulations" mean the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R., Parts 211 and 212, promulgated on January 15, 1974, pursuant to the Emergency Petroleum Allocation Act.

(d) "Class of purchaser" means purchasers of motor gasoline to whom a refiner has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers. *See* 10 C.F.R. § 212.31 and predecessor provisions.

(e) "Maximum allowable price" and "base price" mean, with respect to sales of motor gasoline by a refiner, the weighted average price at which such product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and May 1973, and measured pursuant to the Regulations. *See* 10 C.F.R. § 212.82 and predecessor provisions.

(f) "Nonbranded independent marketer" means a firm which is engaged in the marketing or distributing of motor gasoline, but which is not a refiner and is not a firm which controls, is controlled by, is under common control with, or is affiliated with a refiner, and is not a branded independent marketer. *See* 15 U.S.C. § 752(2) and 10 C.F.R. § 211.51.

(g) "Refiner" means a firm which refines motor gasoline and sells it to others. *See* 10 C.F.R. § 212.31.

(h) "Wholesale purchase-reseller" means a firm which purchases, receives or otherwise obtains motor gasoline and resells it or otherwise transfers it to other purchasers without substantially changing its form. *See* 10 C.F.R. § 211.51.

(i) "Willfully" means that term as employed in Sections 208(a) and 210(b) of the ESA.

IV *Parties*

5. Plaintiff Ashland is a nonbranded independent marketer and wholesale purchaser-reseller of motor gasoline and other petroleum products. Ashland is incorporated under the laws of the State of California and maintains its principal place of business in Oakland, California.

6. Defendant Union is a major integrated oil company and a refiner of motor gasoline and other petroleum products. Union is incorporated under the laws of the State of California.

7. Defendant Federal Energy Administration ("FEA") is an agency of the United States, established and existing under the provisions of the Federal Energy Administration Act, 15 U.S.C. § 761, *et seq.*, and Executive Order No. 11790 (39 Fed. Reg. 23,185, June 27, 1974), both set forth at 15 U.S.C.A. § 761, note, and both of which became effective on June 27, 1974. FEA has the primary responsibility for administering and enforcing the mandatory petroleum pricing and allocation provisions of the EPAA. Prior to June 27, 1974, the duties now delegated to and performed by FEA were performed by the Federal Energy Office under a delegation of authority contained in Executive Order No. 11748 (38 Fed. Reg. 33,575, December 4, 1973). FEA is named as a defendant herein because it may be held to be a necessary party hereto.

V. *Facts*

8. On or about December 6, 1974, and on various dates thereafter, FEA, acting pursuant to the Regulations, issued orders to Union assigning and directing it to supply motor gasoline to Ashland.

9. In accordance with such FEA assignment orders, beginning in January 1975, and continuing until approximtaely February 1976, Ashland purchased from Union approximately 6,370,984 gallons of motor gasoline.

10. During the period relevant to this Complaint, the Regulations provided in substance that a refiner may not charge to any class of purchaser a price in excess of the base price or the maximum allowable price. *See* 10 C.F.R. §§ 212.82, 212.83 and predecessor provisions.

11. Pursuant to the Regulations, Ashland fell within the class of purchaser composed of nonbranded independent marketers who are independent wholesale purchaser-resellers.

VI. *First Cause of Action*

12. During the period relevant to this Complaint, the prices charged by Union to Ashland for motor gasoline sold to it have exceeded the prices charged to other members of the same class of purchaser by not less than 5.5 cents per gallon.

13. As a result of the foregoing, Union has sold motor gasoline to Ashland at prices in excess of those permitted by the Regulations and by the ESA and the EPAA.

14. On or about August 16, 1976, Ashland filed a claim for a refund with Union in the amount of $350,000 for overcharges discovered and accrued up to that date.

15. Pursuant to Section 210(b) of the ESA, as incorporated by reference into Section 5(a)(1) of the EPAA, Ashland is entitled to recover from Union the amount of such overcharges, plus its reasonable attorneys' fees and costs.

VII. *Second Cause of Action*

16. Paragraphs 1 through 13 hereof are repeated and realleged with the same force and effect as if set forth in full herein.

17. During the period relevant to this Complaint, Union has willfully overcharged Ashland for motor gasoline purchased by it.

18. Such overcharges by Union were intentional, and were not the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error.

19. Pursuant to Section 210(b) of the ESA, as incorporated by reference into Section 5(a)(1) of the EPAA, Ashland may be awarded damages against Union in an amount not more than three times the amount of such overcharges, plus its reasonable attorneys' fees and costs.

IX. *Relief*

WHEREFORE, plaintiff prays that it be awarded the following relief against Union:

1. Upon the First Cause of Action, the amount which it has been overcharged.

2. Upon the Second Cause of Action, an amount equal to three times the amount of the overcharges.

3. Interest at the legal rate on each of the foregoing causes of action.

4. Its reasonable attorneys' fees and costs.

5. Such other and further relief as may be just and proper.

Respectfully submitted,

/s/ ROBERT L. DUNN
Robert L. Dunn
Bancroft, Avery & McAlister
240 Stockton Street
San Francisco, Calif. 94108
(415) 982-7526

/s/ WILLIAM H. BODE
William H. Bode
Batzell, Nunn & Bode
1523 L Street, N. W.
Washington, D. C. 20005
(202) 393-8535

Attorneys for Plaintiff

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

/s/ WILLIAM H. BODE
William H. Bode

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-993

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

ASHLAND OIL COMPANY OF CALIFORNIA

and

DEPARTMENT OF ENERGY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF OF RESPONDENT ASHLAND OIL COMPANY OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM H. BODE
ALFRED LAWRENCE TOOMBS
BATZELL, NUNN & BODE
1523 L Street, N.W.
Washington, D.C. 20005
(202) 393-8535

Attorneys for Respondent Ashland Oil Company of California

Of Counsel:
ROBERT L. DUNN
BANCROFT, AVERY & McALISTER
240 Stockton Street
San Francisco, Calif. 94108
(415) 982-7526

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-993

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF OF RESPONDENT ASHLAND OIL COMPANY OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the Temporary Emergency Court of Appeals, to which Congress entrusted exclusive appellate jurisdiction over actions under the Emergency Petroleum Allocation Act of 1973, correctly held that the district court had erred in dismissing, in its entirety, a private action brought thereunder to recover both price

overcharges and treble damages on the ground that each claim was barred by a one-year California statute of limitations governing actions "upon a statute for a penalty or forfeiture."

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California by respondent Ashland Oil Company of California ("Ashland"), a non-branded independent marketer and wholesale purchaser-reseller of motor gasoline and other petroleum products, against petitioner Union Oil Company of California ("Union"), a refiner of such products, and the Federal Energy Administration ("FEA"), now a part of respondent Department of Energy ("DOE").[1] The jurisdiction of the district court was based upon Section 210(b) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended and reenacted by the Economic Stabilization Act Amendments of 1971, 85 Stat. 743, as further amended, set forth as a note following 12 U.S.C.A. §1904 ("the ESA"), as that statute is incorporated by reference into the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §754(a)(1). *See* Petition, pp. 3-4.

The complaint contains separate claims for the recovery of price overcharges and for treble damages, plus attorney's fees on each, resulting from sales of motor gasoline made by Union to Ashland during the period between January 1975 and February 1976 at

[1] FEA was named as a defendant in light of the language contained in *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1023 (Em.App.), *cert. denied*, ____ U.S. ____, 54 L.Ed.2d 98 (1977).

prices in excess of those permitted by FEA's Mandatory Petroleum Price Regulations, 10 C.F.R., Part 212.[2] The gravamen of the complaint is that Ashland belonged to the class of purchaser composed of non-branded independent marketers which are independent wholesale purchaser-resellers, and that Union placed Ashland into a different class of purchaser and thereby charged it prices at least 5.5 cents higher than those charged to other members of the class of purchaser into which Ashland should have been placed. *See* Petition, Appendix D.

This action was commenced on March 23, 1977. Subsequently, Union filed a motion to dismiss the action as to it pursuant to Fed.R.Civ.P. 12(b)(6). Union's motion was based upon the contention that the action was barred *in toto* by the provisions of Section 340(1) of the California Code of Civil Procedure, which prescribes a one-year limitation period for actions "upon a statute for a penalty or forfeiture." *See* Petition, p. 5. The motion came on to be heard before District Judge Charles B. Renfrew on June 23, 1977, at which time the court dismissed the entire action. *See* Petition, Appendix C.

In accordance with the provisions of Section 211(b)(2) of the ESA (*see* Petition, p. 5), as incorporated by reference into the EPAA, 15 U.S.C. §754(a)(1), Ashland took a timely appeal to the Temporary Emergency Court of Appeals of the United States ("TECA"). On

[2] In substance, these regulations prohibit Union from charging to any class of purchaser a price in excess of the weighted average price at which a covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus certain increased costs. *See* 10 C.F.R. §212.82 (definition of "maximum allowable price"); §212.83(a)(1).

December 12, 1977, TECA rendered judgment affirming in part and reversing in part the judgment of the district court and remanding the action to it for further proceedings. *See* Petition, Appendix B. In an opinion written for the court by Judge A. Sherman Christensen, TECA held that (i) the record did not contain facts sufficient to satisfy the federal fraudulent concealment rule so as to toll the statute of limitations; (ii) the claim for actual damages was controlled by the three-year statute; and (iii) the claim for treble damages was governed by the one-year statute. *See* Petition, Appendix A.

The essential basis for TECA's holding is contained in Sections II and III of its opinion. *See* Petition, Appendix A, pp. 7-15. In this passage, the court below first notes that neither the ESA nor the EPAA contains a statute of limitations, and that in such circumstances, federal courts apply the most analogous state statute of limitations. *See* Petition, Appendix A, p. 7. However, in determining what state statute will be applied to a federally created right, courts must be guided by the public policy expressed by Congress. *See* Petition, Appendix A, pp. 7-8. While it found nothing in the statutory structure to indicate that the application of any fixed period of limitations was inconsistent with the national policy expressed in the ESA, the court below found the policy expressed in that statute and its legislative history instructive, and concluded that this policy could best be harmonized with the California statutes of limitations by application of the one-year statute to the treble damage claim and the three-year statute to the actual damages claim. *See* Petition, Appendix A, pp. 8-10.

This result was based upon TECA's conclusion that an award for treble damages pursuant to Section 210 of the ESA would be in the "nature of a penalty" and governed by the California one-year statute of limitations. *See* Petition, Appendix A, pp. 11-12. However, TECA further concluded that application of the one-year statute to an action for actual damages would be inconsistent with the express terms and the underlying policy of the ESA, and therefore recognized the "logical, indeed express, applicability of California's three-year statute of limitations" to the claim for overcharges. *See* Petition, Appendix A, p. 12. The court then analyzed the relevant California authorities and concluded that the result that it reached was not inconsistent with the law of that state. *See* Petition, Appendix A, pp. 12-14.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for the discretionary exercise of this Court's power of review. Congress has invested TECA with exclusive jurisdiction to review judgments of the district courts under the ESA and the EPAA. The decision of the court which is charged with primary responsibility for the interpretation of those statutes is entitled to great weight. No showing is made in the petition that any of the reasons described in this Court's Rule 19 are met so as to warrant review of that decision by this Court. Moreover, the well-reasoned opinion of TECA was clearly correct.

1. There Is No Conflict Between TECA's Opinion And The Decisions Of This Court.

Union opens the argument in its petition with the assertion that the opinion of TECA "is in conflict with settled applicable decisions of this Court." *See* Petition, p. 7. With grim foreboding, Union next asserts that this case is "one of a series" where lower courts "have disregarded" a "settled rule." *Id.* Union submits to this Court that TECA "has legislated" by making a "value judgment" as to "[w]hat is a reasonable period of limitations." *See* Petition, pp. 7, 11. Finally, in a contention which is as audacious as it is frivolous, Union argues that the "harsh impact" of FEA's regulations "should not be augmented by the personal view of judges fortuitously empaneled to hear a particular cause of what period of limitations is desirable." *See* Petition, p. 17.

There is simply no "settled rule" found in the decisions of this Court which is violated by TECA's disposition of this case. None of the cases relied upon so stridently by Union involves or relates in any way to the question faced by the courts below: whether in an action to enforce a *federally* created right under a *federal* statute which contains no limitations period, *federal* courts should apply a one-year *state* statute applicable to actions for statutory penalties or forfeitures to a claim for recovery of compensatory damages because of the mere possibility that the plaintiff might recover exemplary damages.

For example, Union's principal authority, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), held that a decree in admiralty denying a seaman damages for negligence and unseaworthiness was *res judicata* to a subsequent action at law for negligence. The basis for

this holding was that the seaman was required to set forth in his first action "every ground of negligence" which was the basis for his claim. *Id.* at 321. Likewise, in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), the Court held that an award of compensation under a Texas workmen's compensation statute was entitled to full faith and credit in a subsequent action brought in a Louisiana court under that state's workmen's compensation statute. Again, the Court held that where the "grounds for recovery" are the same injury, no "different cause of action" was created by the two state statutes. *Id.* at 443-44. Similarly, in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), the Court held that claims against two foreign insurance companies brought in a state court to recover for a fire loss were not "separate and independent" from a similar claim brought in the same action against a resident insurance agent so as to create diversity of citizenship and permit removal to a federal court pursuant to 28 U.S.C. §1441(c).

None of these three cases establishes any "basic and pervasive principle" (*see* Petition, p. 12) which is violated by the holding of TECA in this action. Each of them involved questions which are quite different from those faced by the courts below: *Phillips* and *Hunt* both involved vindication of the principles of *res judicata* and full faith and credit, which are based in part upon the underlying public policy of preventing "forum shopping." *Finn* involved an application of the congressionally expressed policy of limiting removal jurisdiction in diversity cases. Obviously, the policies exemplified by these three cases have no bearing on the issues which were presented to TECA.

McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), also strongly relied upon by Union, in fact supports the decision of the court below. There, the issue was whether a state court could apply its two-year statute of limitations to bar an action for unseaworthiness which was joined with an action for negligence under the Jones Act, as to which a three-year federal statute was applicable. This Court held that where an action for unseaworthiness is combined with an action under the Jones Act, neither a state nor a federal court, whether at law or in admiralty, can apply to the former a shorter period of limitations than Congress prescribed for the latter. *Id.* at 224. The Court's opinion, delivered by Mr. Chief Justice Warren, held that "[t]he appropriate period of limitations for this action must be determined with an eye to the practicalities of admiralty personal injury litigation." *Id.* In view of the "practical necessity of combining both claims in a single action" under compulsion of the *Phillips* decision, the limitation on the unseaworthiness action "effectively diminishes" the time within which the Jones Act suit must be commenced. *Id.* at 226. Because such a result would be contrary to the policy of "affording seamen 'the full benefit of federal law,'" the Court rejected it. Thus, this Court declined to apply a restrictive state limitations statute because of the overriding national policy expressed in the federal statute.

Similar reasoning was made in this case by TECA, although it did not go as far as this Court did in *McAllister*. TECA determined the question before it with "an eye to the practicalities" of litigation under the Emergency Petroleum Allocation Act. It noted that the national policy expressed in Section 210 of the ESA and its legislative history "tends to repel the extreme

view taken by each of the parties—Ashland's, that California's three-year limitations period and Union's, that its [California's] one-year period should be applied indiscriminately to both claims of the complaint." *See* Petition, Appendix A, p. 9. Accordingly, TECA rejected both of these alternatives in order "that the national policy can best be harmonized with the state statute of limitations." *Id.* Any other result would have been contrary to the principles embodied in this Court's holding in *McAllister*, for it would have applied a state statute of limitations for actions penal in nature to Ashland's federally created claim for actual damages merely because of the discretionary power of the district court to award exemplary damages. Surely, such a result would, as in *McAllister*, fall short of affording plaintiffs under the EPAA and ESA the full benefit of federal law which Congress intended for them to have.

In short, Union's contention that the decision below violates some "basic and pervasive principle" is empty rhetoric. There is no "settled rule" found in the decisions of this Court[3] which would have guided the hand of TECA, or which is contravened by its decision. There is therefore no reason to grant the writ.

2. TECA's Interpretation Of The ESA And The EPPA Was Clearly Correct.

Congress created the Temporary Emergency Court of Appeals in Section 211(b) of the Economic Stabilization Act Amendments of 1971, 85 Stat. 749. The

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[3]Union also cites this Court's decisions in *Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *Hurn v. Oursler*, 289 U.S. 238 (1933). As Union acknowledges, both of these cases dealt with the issue of pendent jurisdiction. For this reason, they have no applicability to the issues presented by this case.

conference committee which resolved the two differing bills which became that statute adopted the Senate provisions relating to the judicial procedures applicable to its administration. S.Conf. Rep. No. 92-579, 92d Cong., 1st Sess. 20 (1971); H.R.Conf. Rep. No. 92-753, 92d Cong., 1st Sess., *reprinted in* [1971] 2 U.S. Code Cong. & Admin. News 2310. The Senate draftsmen stated that the purpose of creating TECA was "to funnel into one court all the appeals" arising under the ESA, thus "insuring prompt and consistent adjudication" of all such cases. S.Rep. No. 92-507, 92d Cong., 1st Sess., *reprinted in* [1971] 2 U.S. Code Cong. & Admin. News 2292-93.

In view of this legislatively expressed purpose in creating TECA, its decisions construing the statutes which it is given the primary responsibility to interpret are entitled to great weight, akin to the deference shown to the expertise of administrative agencies in construing the statutes which govern their actions. *See, e.g., Communist Party v. SAC Board*, 367 U.S. 1, 41 (1961); *NLRB v. Coca-Cola Bottling Co. of Louisville, Inc.*, 350 U.S. 264, 269 (1956); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944).

The construction of the EPAA and the ESA made by TECA in this case was foreshadowed by three of its previous decisions interpreting those statutes. In *Longview Refinery Co. v. Shore*, 554 F.2d 1006 (Em.App.), *cert. denied*, ____ U.S. ____, 54 L.Ed.2d 98 (1977); *Evans v. Suntreat Growers & Shippers, Inc.*, 531 F.2d 568 (Em.App. 1976); and *Manning v. University of Notre Dame du Lac*, 484 F.2d 501 (Em.App. 1973), TECA clearly distinguished between the two distinct types of claims authorized by the ESA. In its decision

in the present case, TECA noted that those cases had interpreted Section 210 of the ESA to draw "a clear distinction" between actions for compensatory damages and treble damages. *See* Petition, Appendix A, pp. 10-11. This result was wholly consistent with those decisions as well as with those of several district courts which have construed this statute.

In *Longview*, the plaintiff had failed to file the "bona fide claim for refund," required by Section 210(b) of the ESA where overcharges are "not willful." The court held that there are two types of Section 210 actions with two different procedural requirements: those which allege willful violations and those which allege non-willful violations. As to the former class, a claim for a refund need not be filed; as to the latter, such a claim is a jurisdictional prerequisite. In *Evans*, the court observed that an action for treble damages had been brought in an apparent attempt to avoid the plaintiffs' failure to present a claim for a refund. Because there was neither willfulness nor a claim for a refund, neither right of action could be maintained. Likewise, in *Manning*, the court held that the plaintiff could survive a Rule 12(b)(6) motion only if he could allege that the overcharge was willful, or in the alternative, that he had made a claim for a refund. The plaintiff's failure to do so prevented prosecution of either right of action. At least three district courts have also recognized this distinction. *See Evanson v. Union Oil Co.*, Energy Mngmt. Rep. (CCH) ¶26,056, at p. 26,452 (D.Minn. 1976); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 114 (S.D. N.Y. 1975); *Thomas v. Amerada Hess Corp.*, 393 F. Supp. 58, 78 (M.D. Pa. 1975).

Since the construction made of the relevant statutes by the court which is specially created to interpret

them was consistent with its own prior decisions, as well as with those of several district courts, its determination was clearly correct. Again, there is no reason to grant the writ.[4]

3. TECA's Determination Was Consistent With The Applicable State Law.

In reaching the conclusion that it did, TECA expressly attempted to harmonize the national policy expressed by the ESA and the EPAA with the limitations law of the forum state. It found ample precedent for the result which it reached in the decisions of the California courts.[5]

In construing their statutes of limitations, the California courts have consistently permitted actions for compensatory damages even in circumstances where claims for multiple damages have been held to be time barred. This result is evidenced by *Stock v. Meek*, 35

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[4]Union contends that because "no conflict between circuits is possible," *certiorari* is "peculiarly call[ed] for." *See* Petition, p. 7. To the contrary, the very fact that TECA was created in order to achieve consistency of decision renders review by this Court all the more unnecessary and superfluous. It is noteworthy that Union filed no petition below for rehearing or suggesting *en banc* proceedings, pursuant to TECA Rule 30(b) and Fed.R.A.P. 35(b).

[5]Union's assertion that the district judge, who reached a contrary result, was "learned in California law," while the judges of TECA were "fortuitously empaneled," *see* Petition, pp. 8 and 17, should be rejected out of hand. The panel of TECA which unanimously decided this case was presided over by the Honorable James M. Carter, a senior judge of the Ninth Circuit and a former district judge for the Southern District of California. Judge Carter was admitted to practice in California in 1928, served for three years as United States Attorney for the Southern District of California, and was appointed to the federal bench in 1949. *See, The American Bench* 14 (1st Ed. 1977).

Cal.2d 809, 221 P.2d 15 (1950), where the defendant was allowed to recover usurious interest paid even though his counterclaim for treble damages under the state usury law was barred. The court there emphasized the separate nature of the two rights of action. 35 Cal.2d at 816-17, 221 P.2d at 20. Similarly, in *Porter v. Arthur Murray, Inc.*, 249 Cal.App.2d 410, 57 Cal.Rptr. 554 (1967), the court allowed recovery of money had and received in violation of the California Dance Act, Cal.Civ. Code §1812.50 *et seq.*, even though the plaintiff had dismissed his claim for treble damages under that statute in the view that it was barred by the one-year statute of limitations. 249 Cal.App.2d at 418, 57 Cal.Rptr. at 560.

Again, in *Stone v. James*, 142 Cal.App.2d 738, 299 P.2d 305 (1956), the plaintiff sought to recover all installment payments made under a conditional sales contract on the ground that he had paid the balance in full prior to maturity but that the defendant had failed to refund a portion of the unearned finance charges as prescribed by statute. The court affirmed the dismissal of the action under the one-year statute of limitations, Cal.Civ.Pro. Code §340(1). The court went on to hold that the plaintiff was apparently correct in contending that the provisions of the statute were severable, and that "there would still exist a right of action . . . to recover the finance charges which were prepaid and not returned. . . ." 142 Cal.App.2d at 739-40, 299 P.2d at 307.

Analogously, in *Beck v. Arthur Murray, Inc.*, 245 Cal.App.2d 976, 54 Cal.Rptr. 328 (1966), the court held that a statutory penalty was not imputable to a licensor under the doctrine of *respondeat superior*, but that it was subject to an action for actual damages. 245

Cal.App.2d at 982, 54 Cal.Rptr. at 332. Finally, in *United States v. Magnolia Motor & Logging Co.*, 208 F. Supp. 63 (N.D. Cal. 1962), a federal court held that the one-year statute of limitations contained in Cal.Civ.Pro. Code §340(1) was applicable to an action brought by the United States to recover treble damages for willful injury to trees under Cal.Civ. Code §3346. However, the court also held that the government's claim for actual damages was a common law cause of action, against which a state statute of limitations could not run.

In its opinion, TECA analyzed and relied upon all of these California cases. Since they clearly support the decision below, it is a correct interpretation of state law as it interfaces with federal law in this action. Once more, there is no reason to grant the writ.

CONCLUSION

The Temporary Emergency Court of Appeals correctly held that the district court had erred in dismissing respondent's claim for the recovery of actual damages under the Economic Stabilization Act Amendments of 1971, as incorporated into the Emergency Petroleum Allocation Act of 1973, on the ground that it was barred by a one-year state statute of limitations relating to "action[s] upon a statute for a penalty or forfeiture." TECA's conclusion that respondent's claim for compensatory damages was governed instead by the three-year statute for "action[s] upon a liability created by statute, other than a penalty or forfeiture" was consistent with its own prior interpretations of these federal statutes as well as with the applicable decisions of the California courts. Nor did

this disposition violate any clearly developed or long standing line of this Court's decisions. In view of the foregoing, there are no special or important reasons requiring the discretionary exercise of this Court's review power. Accordingly, the petition for a writ of *certiorari* should be denied.

Dated: February 10, 1978

Respectfully submitted,

WILLIAM H. BODE
ALFRED LAWRENCE TOOMBS
BATZELL, NUNN & BODE
1523 L Street, N.W.
Washington, D.C. 20005
(202) 393-8535

Attorneys for Respondent
Ashland Oil Company
of California.

Of Counsel:
ROBERT L. DUNN
BANCROFT, AVERY &
McALISTER
240 Stockton Street
San Francisco, California 94108
(415) 982-7526

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No. 77-993

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

ASHLAND OIL COMPANY OF CALIFORNIA
and DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE DEPARTMENT OF ENERGY IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
BARBARA WARD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1-15) is reported at 567 F. 2d 984. The district court did not write an opinion.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (Pet. App. 16) was entered on December 12, 1977. The petition for a writ of certiorari was filed on January 11, 1978. The jurisdiction of this Court is invoked under Section 705(c)(2) of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 607, incorporating 87 Stat. 633, 15 U.S.C. (1976 ed.) 754(a)(1), and 85 Stat. 750, 12 U.S.C. (1976 ed.) 1904 note.

QUESTION PRESENTED

Whether California law, when applied in a federal action alleging overcharges in violation of the Emergency Petroleum Allocation Act of 1973, provides a one-year statute of limitations on treble damage claims but a three-year limitations period on claims for compensatory relief.

STATEMENT

On March 23, 1977, respondent Ashland Oil Company of California commenced this action in the United States District Court for the Northern District of California, alleging that, between January 1975 and February 1976, petitioner sold gasoline to Ashland at prices in excess of those permitted by the Federal Energy Administration's Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212. Ashland sought recovery of the overcharges and treble damages, under Section 210(b) of the Economic Stabilization Act of 1970, as added, 85 Stat. 748, 12 U.S.C. (1976 ed.) 1904 note, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. (1976 ed.) 754(a)(1).[1]

Petitioner moved to dismiss on statute of limitations grounds. Because the federal substantive law did not specify a limitations period, the district court turned to state law and concluded (Pet. App. 4 n. 7, 17) that Ashland's action was wholly barred by Cal. Code Civ.

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[1]The Federal Energy Administration ("FEA") was named as a defendant in response to the admonition in *Longview Refining Co.* v. *Shore*, 554 F. 2d 1006, 1023-1024 (T.E.C.A.), certiorari denied, October 3, 1977 (No. 76-1863). Pursuant to the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (to be codified in 42 U.S.C. 7101 *et seq.*), and Executive Order 12009, 42 Fed. Reg. 46267 (September 13, 1977), FEA became part of the newly-created Department of Energy on October 1, 1977.

Pro. § 340(1) (West's 1954), which prescribes a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture." The court held that the claim for recovery of overcharges could not be separated from the treble damage claim, and that because a statutory authorization of a treble damage remedy is penal in character, both claims are governed by Section 340(1).

The court of appeals affirmed with respect to the treble damage claim but reversed with respect to the claim for recovery of overcharges (Pet. App. 1-15). The court held that the claim for compensatory relief is governed not by Section 340(1), but by Cal. Code Civ. Pro. § 338 (West's 1954), which provides a three-year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture." Petitioner challenges this aspect of the court of appeals' decision.

ARGUMENT

Section 210 of the Economic Stabilization Act of 1970 ("ESA") provides for both compensatory and exemplary damages. Compensatory relief (*i.e.*, recovery of amounts charged in excess of permissible prices) is available in all overcharge cases, provided that the purchaser requested a refund from the seller and did not receive repayment within 90 days. Exemplary damages are available only when an overcharge was intentional. No request to the seller is necessary in the latter case.

The court of appeals properly concluded that state law, which furnishes the period of limitations here, treats Section 210 as two different rights of action for statute of limitations purposes. This ruling conforms with earlier decisions of the court of appeals. See *Longview Refining Co.* v. *Shore*, 554 F. 2d 1006 (T.E.C.A.), certiorari denied, October 3, 1977 (No. 76-1863); *Evans* v. *Suntreat Growers & Shippers, Inc.*, 531 F. 2d 568 (T.E.C.A.); *Manning* v. *University of Notre Dame du Lac*, 484 F. 2d 501 (T.E.C.A.).

Petitioner relies (Pet. 12-14) on a number of cases involving the definition of a "cause of action"—a term that was deleted from the federal rules because of its uncanny ability to produce sterile debate about verbal questions. This Court has called the entire concept of causes of action "outmoded." *Aldinger* v. *Howard,* 427 U.S. 1, 8. The concept is useful today, if at all, only to answer questions about the scope of *res judicata.*

The court of appeals in this case properly declined to rely on the old cases concerning causes of action. It looked, instead, to the relevant state statutes of limitations and considered the federal policy interests reflected in ESA and the Emergency Petroleum Allocation Act of 1973 ("EPAA"). In the absence of a limitations period provided by Congress, a federal court usually should apply the most analogous state statute of limitations. See, *e.g., Runyon* v. *McCrary,* 427 U.S. 160, 179-180; *Auto Workers* v. *Hoosier Corp.,* 383 U.S. 696, 701-705; *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395. In doing so, however, the court must take into account the policy expressed by Congress in the governing substantive law. *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* 432 U.S. 355, 367.

The court of appeals' application of California's statutes of limitations respects both the state laws and the important federal interests. Sections 338(1) and 340(1) of the California Code of Civil Procedure distinguish between ordinary statutory actions and actions on statutes that impose a penalty. Petitioner has not explained why Ashland's action to recover overcharges should be treated as an action "for a penalty" for statute of limitations purposes. Moreover, on several occasions, California courts have approved different limitations periods for exemplary and compensatory damage claims arising out of the same factual situation. See Pet. App.

10-15, discussing *Stock* v. *Meek,* 35 Cal. 2d 809, 221 P. 2d 15; *Porter* v. *Arthur Murray, Inc.,* 249 Cal. App. 2d 410, 57 Cal. Rptr. 554; *Stone* v. *James,* 142 Cal. App. 2d 738, 299 P. 2d 305. There is no reason for this Court to review the court of appeals' decision that, under California law, a three-year period of limitations applies to compensatory damages even though a one-year period applies to exemplary damages arising out of the same wrong.

The result produced by the court of appeals' decision is consistent with the federal policies underlying ESA and EPAA. Those statutes were intended to ensure that prices on certain commodities would not exceed maximum levels set by the federal government. Suits to recover overcharges were authorized in order to provide a remedy for private parties injured by illegal pricing practices and thereby to aid federal agencies in their enforcement of price control legislation. These objectives would not be served if actions for compensatory relief were governed by the one-year statute of limitations advocated by petitioner. If Congress had not authorized the recovery of treble damages for intentional overcharges, Ashland's suit to recover single damages for ordinary (negligent) overcharges undoubtedly would be governed by a three-year period of limitations. It would defeat the evident intent of Congress in authorizing treble damages to hold that this authorization shortened the limitations period for single damages, thus making them less effective as a remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
BARBARA WARD,
Attorneys.

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Petitioner's Reply Brief in Support of Petition for Writ of Certiorari

MOSES LASKY
Spear Street Tower, Suite 2840
1 Market Plaza
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorney for Petitioner

Of counsel:
BROBECK, PHLEGER & HARRISON
Spear Street Tower
1 Market Plaza
San Francisco, CA 94105
Telephone: (415) 442-0900

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioner's Reply Brief in Support of Petition for Writ of Certiorari

Analysis of the brief of Ashland in opposition* discloses that in fact it concedes the truth of what we submitted in support of the petition.

Respondent argues (p. 5) that "Congress has invested TECA with exclusive jurisdiction to review judgments of the district courts under the ESA and the EPAA". If by this respondent means what the petition said (p. 7), that appeals from the district courts are all funnelled through the Temporary Emergency Court of Appeals instead of through the courts of appeals, it is true. If it suggests that this Court lacks power to review, it is incorrect. Congress expressly reaffirmed the Court's right to re-

*None has been filed by the Department of Energy.

view TECA decisions on certiorari, just as this Court has the right to review decisions of courts of appeals, with one difference only, that the petition be filed within 30 days (85 Stat. 750).

Later (at p. 10) respondent takes a more modest position, but no sounder, that decisions of TECA "are entitled to great weight, akin to the deference shown to the expertise of administrative agencies in construing the statutes which govern their actions". But no deference is given administrative agencies on matters not within their peculiar sphere (*Board v. Hearst Publications,* 322 U.S. 111, 130, 131). Congress did establish TECA to deal with important issues in the field of energy and price control requiring uniform determination, but what is involved here is not interpretation of the technological application of the law. It is (a) either determination of *California* law, on which TECA has no special expertise, or (b) application of general principles of jurisprudence not peculiar to this specific legislation, of which this Court is the established guardian, and with respect to which TECA has no peculiar expertise either. We submit that a jurisprudence of price regulation should not be permitted to arise cut off from the general body of principles of universal application; no separate satrapy has been created by Congress.

Here the decision of the court below *avoided* applying California law, and respondent's brief does not claim that it either applied California law or construed California law differently from the district court. Taking off from our reference to the district judge as "learned in California law", respondent counters that the Honorable James C. Carter, one of the members of the TECA panel, is also learned in California law. So he is. The difference is that the district judge stated what California law was, while TECA did not even purport to do so. Its decision went off in a totally different direction, holding that, regardless of California law, some federal public policy, unstated in the statue or its legislative history, required some other disposition (petition, p. 8), and respondent does not claim otherwise.

In order to deny that the decision below ignores a pervasive principle settled by this Court, respondent would distinguish our citations on the basis that some relate to *res judicata,* others to full faith and credit, others to removal of actions to federal courts, others to pendent jurisdiction, whereas this case relates to statutes of limitations. But the fact that a principle is applied in a variety of situations is the perfect demonstration that it is "a most basic and pervasive principle" (pet., p. 12), and that was the very point of the citations. Here the principle is that "there is only one cause of action where a single primary right has been violated" (pet., p. 12), and the vice of the decision below is that it does "violence to principles pervading the whole fabric of jurisprudence" (pet., pp. 7-8). One of the cases cited by us did involve a statute of limitations, *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221 (1958). Respondent argues (p. 8) that the case supports its contention that a federal policy can supersede a state statute of limitations. But in *Magnolia* the federal limitations policy was embodied in an express limitation provision of the federal statute. Because there was only one cause of action, there could be only one applicable statute of limitations, and because there was an express federal statute of limitation, it and not any state statute had to be applied to every aspect of the claim. Here, where there is no federal statute of limitations, and there is the state statute, the same policy against splitting a cause of action must preclude judicial creation of a separate limitation period for one aspect.

On the basis of a view of public policy neither expressed in the statute nor found in legislative history, the court below has

(1) declined to follow the established rule that the state statute of limitations governs where no federal statute is created, and

(2) has split a single cause of action into two, contrary to settled law.

These are the facts on which we submit that review should be granted, and respondent does not challenge these facts.

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: February 16, 1978.

By MOSES LASKY
Moses Lasky
Attorney for petitioner